

**DAYAWATHIE AND OTHERS
V.
GUNASEKERA & ANOTHER**

SUPREME COURT
AMERASINGHE, J.
DHEERARATNE, J. AND
WADUGODAPITIYA, J.
SC APPEAL 17/87; CA 329/74 (F); DC COLOMBO 12617/L.
APRIL 4, 1991.

Trusts Ordinance, Sections 5 and 83 - Agreement to re-transfer - Evidence Ordinance, Section 92 - Oral evidence to vary contents of a notarial deed - Permissibility.

The Plaintiff bought the property in suit in 1955. He started construction work in 1959 and completed in 1961. The Plaintiff, a building contractor, needed finances in 1966 and sought the assistance of the 2nd defendant with whom he had transactions earlier. This culminated in a Deed of Transfer in favour of the 1st Defendant, who is the mother of the 2nd Defendant and the 2nd Defendant being a witness to the Deed. The property was to be re-transferred within 3 years if Rs. 17,000/- was paid. The Plaintiff defaulted. In his action to recover the property, the Plaintiff succeeded in the trial Court in establishing a constructive trust. The Court of Appeal reversed the judgment on the sole ground that the agreement was a pure and simple agreement to re-transfer.

Held:

- (i) The Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in the property.
- (ii) Extrinsic evidence to prove attendant circumstances can be properly be received in evidence to prove a resulting trust.

Cases referred to:

- (1) *Theevanapillai v. Sonnappillai* (1921) 22 N.L.R. 316.
- (2) *Walliamma Atchi v. Abdul Majeed* (1947) 48 N.L.R. 289.
- (3) *Fernando v. Thamil* (1946) 47 N.L.R. 297.
- (4) *Muttamma v. Thiagaraja* (1961) 62 N.L.R. 559.
- (5) *Shanmuganathan Pillai v. Unjappa Kone* (1944) 46 N.L.R. 313.
- (6) *Carthelis Appuhamy v. Saiya Nona* (1945) 46 N.L.R. 313
- (7) *Savarimuthu v. Thangavelayuthan* (1954) 55 N.L.R. 529.

APPEAL from judgment of the Court of Appeal.

P.A.D. Samarasekera P.C. with R.B. Seneviratne and Hemasiri Vithanachchi for Substituted - Plaintiff - Appellants

H.L. De Silva P.C. with T.B. Dillimuni and P.M. Ratnasekera for Defendant - Respondents.

May 5, 1991

DHEERARATNE, J.

The original plaintiff (since deceased) filed this action against the 1st

and 2nd defendants who are mother and son respectively. The 1st defendant died pending these proceedings and the 2nd defendant was appointed as her legal representative. The original plaintiff sought a declaration against the defendants that the property which is the subject matter of this action is held by the first defendant in trust for him and for an order of court directing the first defendant to execute a deed transferring the said property to him on hire payment of a sum of Rs. 17,000 to the first defendant.

The learned trial judge gave judgment for the original plaintiff as prayed for on the basis that a constructive trust has been proved; the Court of Appeal set aside that judgment and dismissed the plaintiff's action. The original plaintiff died pending proceeding in the Court of Appeal and his widow and children were, substituted as first to seventh substituted - plaintiffs, who have now preferred an appeal to this court against the judgment of the Court of Appeal. Since then the first substituted-plaintiff too died and the 2nd substituted-plaintiff was appointed as the legal representative in her place.

The circumstances leading to the filing of this action are briefly as follows. The original plaintiff became owner of the property in suit by right of purchase in 1955. About 1959 he commenced the construction of a residential house in the land and for this purpose borrowed a sum of Rs. 15,000 from the National Housing Department on a Mortgage of the property. The construction was completed in about 1961 and soon thereafter he went into occupation with his family. He was engaged in the business of a building contractor and was in need of some money for his business somewhere in the middle of 1966. This led him to seek financial assistance from the 2nd defendant from whom he had borrowed money even earlier. The first defendant was a total stranger to him. The negotiation for money culminated in the execution of deed P1 dated 10th August 1966 transferring his residential house and property in favour of the first defendant, the second defendant remaining in the background only to be one of the attesting witnesses. Deed P1 is ex facie a deed of transfer for a consideration of Rs. 17,000 and according to the attestation of the notary Rs. 10,000 passed in his presence and the balance Rs. 7,000 was acknowledged to have been received earlier.

The original plaintiff alleged that on execution of P1 he obtained only a sum of Rs. 10,000 from the second defendant, who showing reluctance to figure in a notarial transaction while being a government servant,

wanted the property transferred in the name of his mother the 1st defendant, however, undertaking to get the property retransferred on receipt of a sum of Rs. 17,000 within a period of three years. This version is reflected in the letter of demand P10 sent on behalf of the original plaintiff to the first defendant preparatory to filing the action, to which letter there had been no reply.

After a meticulous examination of the oral and documentary evidence, the learned trial judge accepted the version of the original plaintiff on the transaction in toto and no serious attempt was made either in the Court of Appeal or in this Court to challenge the correctness of the learned trial judge's findings of fact. The sole basis of the reversal of the judgment of the trial judge by the Court of Appeal appears to be that it regarded the transaction between the parties as a pure agreement to re-transfer the property, of which agreement time was the essence and that the plaintiff's action *perforce* fails in consequence of his default to tender the money within the stipulated period of 3 years.

On the arguments presented to us, it seems to me that two questions require *our* determination; firstly whether to prove a *constructive trust* within the meaning of section 83 of the Trusts Ordinance, oral or extrinsic evidence could be admitted of facts in violation or in disregard of section 92 of the Evidence Ordinance; and secondly if such evidence is admissible whether the facts so *adduced* in this case are sufficient to establish a constructive trust.

As far as express trusts (as opposed to constructive trusts) relating to immovable property are concerned, section 5(1) of the Trusts Ordinance makes their validity depend upon a declaration by a last will or by a non-testamentary instrument which is notarially executed. The relaxation of this rule by the provisions of section 5(3), so as to prevent its operation as to effectuate a fraud had already persuaded courts to treat section 5(3) as an exception to the application of section 2 of the Prevention of Frauds Ordinance and section 92 of the Evidence Ordinance. See *Theevanapillai v. Sinnapillai*⁽¹⁾ *Walliamma Atchi v. Abdul Majid P.C.*⁽²⁾ and *Fernando v. Thamel*⁽³⁾. These authorities afford little assistance to the resolution of the present problem except perhaps to the limited extent of finding somewhat of an analogous situation.

An examination of section 83 of the Trusts Ordinance reveals the most material words in that section are "it cannot reasonably be inferred

consistently with the attended circumstances that he (the owner) intended to dispose of the beneficial interest therein". Mr. H.L. de Silva P.C. for the respondent submits that one cannot surmount the barrier created by section 92 of the Evidence Ordinance in order to lead parol evidence to establish a trust, because section 92 makes no exception and is a general provision applicable to all cases governing proof of facts. He further submits only if fraud or want of consideration are sought to be established in terms of proviso (1) to section 92 that an inference of constructive trust may be drawn.

As was emphasized by Sir John Beaumont in *Walliamma Atchi v. Abdul Majid* (supra) one has to bear in mind that the Trusts Ordinance is a later enactment, and it deals expressly with trusts. Naturally in any conflict of the provisions of the Evidence Ordinance with the provisions of the Trusts Ordinance the later must undoubtedly prevail. I think the best of all guides on this question is the observation of H.N.G. Fernando J. (as he then was) in *Muttamma v. Thiyagarajah* ⁽⁴⁾ when he stated as follows:-

"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise but only to establish an "attendant circumstances" from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only section 83, but also many of the other provisions in chapter IX of the Trusts Ordinance will be nugatory. If for example "attendant circumstances" in section 83 means only matters contained in an instrument of transfer of property, it is difficult to see how a conveyance of property can be held in trust unless indeed its terms are such as to create an express trust".

I am in most respectful agreement with Fernando J. and I hold that extrinsic evidence to prove "attendant circumstances" had been properly received in evidence at the trial.

On the next question as to the adequacy of evidence to prove a resulting trust the following "attendant circumstances" have been accepted by the learned trial judge as pointing to the fact that beneficial interest of the property was not parted with by the original plaintiff.

- (1) The oral promise to reconvey the property in suit on receipt of Rs. 17,000 comprising of money advanced and the interest thereon.
- (2) The original plaintiff (transferor) continuing to remain in possession and enjoying the property.
- (3) The original plaintiff's agreement to pay all instalments that will fall due on account of the loan obtained from the National Housing Department.
- (4) The gross disparity between the consideration on the face of the deed (Rs. 17,000) and the market value of the property (Rs. 70,000 - 80,000)
- (5) The first defendant's failure to take any steps to assert her ownership in pursuance of the purchase until she received the letter of demand P10, namely, the failure to get her name registered as the owner in the assessment register of the local authority and non payment of instalments payable to the National Housing Department.
- (6) The original plaintiff taking steps to obtain a loan from the State Mortgage Bank soon after the transaction to pay off debts due to the defendants and to the National Housing Department.

These "attendant circumstances" in my view are sufficient to demonstrate that the original plaintiff hardly intended to dispose of his beneficial interest in the property. I find that the facts in the instant case are different from those of *Shanmuganathan Pillai v. Unjappa Kone*⁽⁶⁾; *Carthelis Appuhamy v. Saiya Nona*⁽⁶⁾ and *Savarimuttu v. Thangavelauthan*⁽⁷⁾, in all of which the attendant circumstances were found to be inadequate.

It appears that the Court of Appeal ignored all circumstances proved above and fell into error by treating the transaction between the parties as a mere contract to re-purchase in which class of contract, time is the essence. This conclusion could be arrived at only on the footing that the original plaintiff transferred both his legal and beneficial interests

by deed P1. For the above reasons the judgment of the Court of Appeal is set aside and the judgment of the District Court is affirmed.

I direct that:-

- (1) The 2nd - 7th substituted-plaintiffs do deposit a sum of Rs. 17,000 and a further sum of Rs. 5200, latter sum being what the defendants paid to the National Housing Department, both sums with legal interest from 4.10.1974 to 4.05.1991 to the credit of this case on or before 31.5.1991.
- (2) If the said sum of money is paid as aforesaid, the 2nd defendant (legal representative of the 1st defendant) do transfer the property described in the schedule to deed No. 559 of 10.08.1966 in favour of the 2nd - 7th substituted - plaintiffs in equal shares on or before 30.06.1981.
- (3) If the said sum of money is deposited as set out in (1) and the 2nd defendant fails to effect a transfer as stated in (2) above, the Registrar of the District Court do effect the conveyance in favour of the 2nd - 7th substituted-plaintiff on or before 31.07.1991.
- (4) The 2nd defendant be entitled to withdraw the said sum of money referred to in (1) above. only after the execution of a conveyance by him or by Registrar of the District Court as stated above.
- (5) The 2nd - 7th substituted-plaintiffs do bear all expenses of the conveyance of the property in their favour.
- (6) The Registrar of the Supreme Court do send the record of this case back to the District Court as expeditiously as possible to enable the parties to conform with these directions.

The appeal is allowed and the substituted-plaintiffs will be entitled to costs of action in this Court and in both Courts below.

AMERASINGHE, J. - I agree

WADUGODAPITIYA J. - I agree

Appeal allowed